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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/032, 893 02/27/98 BIESER

J 41824B

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OSBORNE K MCKINNEY  
B 1211  
2301 BRAZOSPORT BOULEVARD  
FREEPORT TX 77541

EXAMINER

JUSKA, C

ART UNIT

PAPER NUMBER

1771

10

DATE MAILED:

05/23/00

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

## Office Action Summary

Application No. 09/032,893	Applicant(s) Belser et al.
Examiner Ch ryl Juska	Group Art Unit 1771

Responsive to communication(s) filed on Mar 13, 2000

This action is FINAL.

Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle 35 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

### Disposition of Claim

Claim(s) 1-6 and 9-12 is/are pending in the application.

Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

Claim(s) \_\_\_\_\_ is/are allowed.

Claim(s) 1-6 and 9-12 is/are rejected.

Claim(s) \_\_\_\_\_ is/are objected to.

Claims \_\_\_\_\_ are subject to restriction or election requirement.

### Application Papers

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

The proposed drawing correction, filed on \_\_\_\_\_ is  approved  disapproved.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. § 119

Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All  Some\*  None of the CERTIFIED copies of the priority documents have been

received.

received in Application No. (Series Code/Serial Number) \_\_\_\_\_.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_

Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

### Attachment(s)

Notice of References Cited, PTO-892

Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_

Interview Summary, PTO-413

Notice of Draftsperson's Patent Drawing Review, PTO-948

Notice of Informal Patent Application, PTO-152

-- SEE OFFICE ACTION ON THE FOLLOWING PAGES --

Art Unit: 1771

## **DETAILED ACTION**

### *Response to Amendment*

1. Amendment A, submitted as Paper No. 8 on March 13, 2000, has been entered. Claims 7, 8, 13, and 14 have been cancelled. Claims 10-12 have been amended as requested. Thus, the pending claims are now claims 1-6 and 9-12.
2. Amendment A is sufficient to withdraw the 112, 2nd rejection of claims 10-12, as set forth in section 7 of the last Office Action.
3. The Declaration filed on March 13, 2000 under 37 CFR 1.131 has been considered but is ineffective to overcome the cited Jialanella (US 5,741,594) reference. The evidence provided in said Declaration is insufficient to establish conception of the presently claimed subject matter in that the scope of the declaration is not commensurate with the scope of the claims. In particular, the Declaration merely evidences that a substantially linear ethylene (SLE) polymer was employed as an adhesive carpet backing. However, Applicant's independent claim 1 is broader in scope in that said claim is drawn to a carpet comprising (a) a fibrous face, (b) a primary backing, (c) an adhesive backing, and (d) an optional secondary backing, wherein at least one of (a)-(d) is comprised of a "homogeneously branched ethylene (HBE) polymer characterized as having a short chain branching distribution index (SCBDI) of greater than or equal to 50%." Thus, said Declaration does not provide evidence of conception of the following:
  - i. the broader class of HBE polymers (compared to the evidenced SLE),

Art Unit: 1771

- ii. the claimed SCBDI, and
- iii. the claimed embodiments wherein the face fibers, the primary backing and/or the secondary backing are comprised of said HBE.

Therefore the following prior art rejections are maintained from the last Office Action.

4. Additionally, MPEP 715.04 sets forth who may make a Declaration.

The following parties may make an affidavit or declaration under 37 CFR 1.131:

- (A) **All the inventors of the subject matter claimed.**
- (B) An affidavit or declaration by less than all named inventors of an application is accepted *where it is shown that less than all named inventors of an application invented the subject matter of the claim or claims under rejection.* For example, one of two joint inventors is accepted where it is shown that one of the joint inventors is the sole inventor of the claim or claims under rejection.
- (C) The assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor. Ex parte Foster, 1903 C.D. 213, 105 O.G. 261 (Comm'r Pat. 1903).

Affidavits or declarations to overcome a rejection of a claim or claims on a cited patent or publication must be made by the inventor or inventors of the subject matter of the rejected claim(s) or the assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor(s). Thus, where all of the named inventors of a pending application are not inventors of every claim of the application, any affidavit under 37 CFR 1.131 could be signed by only the inventor(s) of the subject matter of the rejected claims. Further, where it is shown that a joint inventor is deceased, refuses to sign, or is otherwise unavailable, the signatures of the remaining joint inventors are sufficient. However, the affidavit or declaration, even though signed by fewer than all the joint inventors, must show completion of the invention by all of the joint inventors of the subject matter of the claim(s) under rejection. In re Carlson, 79 F.2d 900, 27 USPQ 400 (CCPA 1935).

Thus, said Declaration is insufficient because (a) not all the inventors have signed said Declaration or (b) it has not been shown that Osbourne McKinney is the sole inventor of the claims under rejection.

Art Unit: 1771

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

6. Claims 1-6 and 10-12 are rejected under 35 U.S.C. 102(e) as being anticipated by US Patent 5,741,594 issued to Jialanella.

Jialanella discloses a laminate and adhesive comprising a substantially linear ethylene polymer, such as that taught in US Patent 5,272,236 issued to Lai et al. (It is noted that Applicant teaches the Lai polymer in the specification, page 17, lines 1-6). The invention of Jialanella is taught to be useful as ‘carpet-backing’ (abstract and col. 5, lines 46-48). Although Jialanella does not explicitly teach Applicant’s limitation of a carpet face of fibers, said limitation is deemed inherent to a carpet having a ‘carpet-backing.’ Therefore, said claims are anticipated by the cited Jialanella patent.

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are

Art Unit: 1771

such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over the cited Jialanella patent.

Although Jialanella does not teach the fiber polymer, it is well known in the art of carpeting to employ polyolefins, specifically, polypropylene or polyethylene, as face fibers. Additionally, Applicant is given Official Notice that recyclable polyolefin carpets are well known in the art. Thus, it would have been obvious to one skilled in the art to choose a polyolefin face fiber in the invention of Jialanella, with the intention of enhancing the recyclability of the carpet.

Furthermore, Applicant is given Official Notice that labels and or literature are included with all carpets for sale in the United States. Applicant's limitation to the 'representation' of the label or literature is not given patentable weight because the words or symbols written on said label or literature are not structural limitations of the claimed article.

#### ***Response to Arguments***

9. Applicant's arguments filed with Amendment A, regarding the above prior art rejections, have been fully considered but they are not persuasive. In particular, Applicant asserts that the present invention "does not rely on the recyclability feature of their invention *per se* to supply the inventive step" (Amendment A, page 3, 3rd paragraph). In response, it is asserted that motivation for obviousness in a prior art rejection need not be the same as Applicant's motivation for the

Art Unit: 1771

claimed invention, if the resulting article of the obviousness rejection meets the Applicant's structural limitations for the claimed invention. Thus, the Examiner's arguments presented in section 8 above, with regard to recyclability, are still valid.

*Conclusion*

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is (703) 305-4472. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris, can be reached at (703) 308-2414. Fax numbers for this Group are (703) 305-3601 and (703) 305-7718.

May 20, 2000

  
BLAINE COOPENHEAVER  
PRIMARY EXAMINER